

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for	)	File No. WC 02-77
	)	
Declaratory Ruling Clarifying that the	)	
Wholesale DSL Services Qwest Provides to	)	
MSN Are Not "Retail" Services Subject	)	
to Resale Under Section 251(c)(4) of the	)	
Act	)	

COMMENTS OF SPRINT CORPORATION

Sprint Corporation ("Sprint"), on behalf of its independent incumbent local exchange and competitive local exchange/long distance operations, respectfully submits its comments in the above-captioned proceeding in response to the Public Notice ("PN") released April 15, 2002 (DA 02-879).

The PN requests comments on Qwest's April 3, 2002 Petition requesting a declaratory ruling that, contrary to the claims of the Minnesota Department of Commerce (DOC), Commission Rule 51.605(c)<sup>1</sup> applies to Qwest's sale of DSL services to Microsoft Network, L.L.C. (MSN) notwithstanding Qwest's provision of billing, collection, and marketing services for MSN. Rule 51.605(c) provides that advanced telecommunications services, including DSL services, sold to Internet Service Providers ("ISP") as an input component to the ISPs' retail Internet service is not a telecommunications service offered at retail and, accordingly, is not subject to the

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<sup>1</sup> 47 C.F.R. § 51.605(c).

incumbent LEC obligation to make such service available for resale at wholesale rates under Section 251(c)(4) of the Act.<sup>2</sup>

Qwest sells DSL services on a retail basis directly to end-users pursuant to its Tariff F.C.C. No. 1, § 8.4.1.<sup>3</sup> Those services are not in question in this proceeding. Separately, pursuant to its Tariff F.C.C. No. 1 § 8.4.4., Qwest sells bulk DSL capacity, at a volume discount, to ISPs. The ISPs combine the DSL service with their own Internet access service and sell the bundled package directly to end-users. Qwest's tariff requires the ISPs to deal directly with the ISPs' end-users regarding CPE (*e.g.* DSL modems), service related issues, and customer service.<sup>4</sup> MSN is one of the ISPs that purchases Qwest's bulk DSL service.

Pursuant to contracts, separate from the tariffs, Qwest also provides MSN with billing, collection, and sales agency services. Through these contracts, Qwest has some minimal contact with the ultimate end-users; however, MSN still has overall responsibility for the bundled services and all end-user customer care matters and, importantly, bears the risk of loss in the event of non-payment by MSN's end user.<sup>5</sup>

The DOC claims that these contract services - billing, collection, and sales - make Qwest the retail provider of the service to the end user, not MSN. Accordingly, DOC argues that these services fall outside of the exception of 51.605(c). DOC claims that Qwest is providing the services at retail and, accordingly, must make its bulk DSL services available for resale at the wholesale discount.

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<sup>2</sup> 47 U.S.C. § 251(c)(4).

<sup>3</sup> Affidavit of Vice President Steven K. Starliper In support of Qwest's Petition for Declaratory Ruling, Exhibit A to the Petition, at para. 3.

<sup>4</sup> *Id.*, at paras. 4-5.

<sup>5</sup> *Id.*, at para. 12.

Qwest counters that its bulk DSL offering to ISPs is exactly the type of arrangement the Commission contemplated in the *AOL Bulk Services Order*<sup>6</sup> wherein the Commission adopted Rule 51.605(c). According to Qwest, the billing, collection, and sales agency services do not change the underlying nature of the transaction -- Qwest is a wholesaler to the ISP who in turn bundles Qwest's wholesale service with ISP service to create a finished service that is sold by the ISP to the end-user at retail. Accordingly, the 51.605(c) exception to resale at the wholesale discount applies.

Sprint strongly supports Qwest's position. Sprint urges the Commission to grant Qwest's petition and to declare that Rule 51.605(c) applies to Qwest's bulk DSL services, notwithstanding the fact that Qwest provides billing, collection, and sales agency services to the ISP.

It is clear that Qwest's arrangement with MSN places MSN, not Qwest, as the retail provider of the service. As noted above, MSN has control over the terms and conditions of the end user service and over all of the substantive terms of the customer relationship. Importantly, it is MSN, not Qwest, that bears any risk of loss due to end-user non-payment for the bundled DSL and Internet access service.<sup>7</sup> Additionally, there is substantial history and precedent that establishes that the provision of the billing,

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<sup>6</sup> *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, CC Docket No. 98-147, FCC 99-330, released November 9, 1999 ("*AOL Bulk Services Order*")

<sup>7</sup> In the Commission's *Intermountain* decision [*Intermountain Microwave*, 94 Rad. Reg. (P&F) 983, 12 F.C.C. 2d 559 (1963)] the Commission acknowledged that the bearing of financial risk and reward is one of the critical indicia in determining when an entity has defacto control of a FCC license. While not directly on point, Sprint believes this factor should be the determining factor here in determining who owns or controls the retail relationship with the end user.

collection, and sales services by Qwest to the ISP does not impact the underlying relationship, or change the fact that MSN is the retail provider of the bundled service.

ILECs, and notably the RBOCs, have for years provided billing and collection services for interexchange carriers interstate interLATA traffic. These arrangements have been undertaken with Commission knowledge and approval.<sup>8</sup> The provision of these billing and collection services did not turn the RBOC into the retailer of the interstate, interLATA service. Had it, there would have been a clear violation of, initially, the MFJ, and more recently, Sections 271 and 272 of the Communications Act of 1934, as amended.<sup>9</sup>

Likewise, sales services cannot be said to convert Qwest into the retailer of the bundled service in question in this case. Today, the RBOCs cannot provide interstate, interLATA telecommunications services until the RBOC has met the requirements of Section 271. Once the RBOC has been held to meet those requirements it can provide interstate, interLATA services but, it still cannot do so directly as the retail provider of the services. Rather, the RBOC must, at least for three years, provide the service through a separate affiliate.<sup>10</sup> Notwithstanding that the RBOCs cannot provide the service at retail to the end-user, the Commission has specifically allowed the RBOCs to provide

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<sup>8</sup> Indeed, prior to 1986 ILEC provision of billing and collection services for interexchange carriers was pursuant to federal tariffs filed with the FCC tariffs. In 1986 in *In the Matter of Detariffing of Billing and Collection Services*, CC Docket No. 85-88, 102 F.C.C. 2d 1150 (1986) the Commission detariffed billing and collection services and, interestingly, noted at paras 3-4: "Such billing and collection would not be incidental to any service offered by the local exchange carrier, but would be a service offered to another carrier. 4. The MFJ did not preclude the divested BOCs from continuing to provide billing and collection for AT&T."

<sup>9</sup> 47 U.S.C. § 271 and 272.

<sup>10</sup> 47 U.S.C. § 272(a)(2)(B) and (f)(1).

sales agency services to their affiliates for the affiliates retail sale of interstate interLATA telecommunications services.<sup>11</sup>

Obviously, the Commission did not consider the provision of such services to a vendor as creating a retail relationship between the sales agent, or the billing agent, or both, and the ultimate end-user of the underlying telecommunications service in the case of interstate, interLATA telecommunications services. Neither should it here.

Alternatively, Qwest argues that if it is deemed to be providing a service "at retail" directly to end users, that service could only be the bundled service that combines DSL with Internet access. Qwest points to the Commission's tentative conclusion in the *Broadband Wireline NPRM*<sup>12</sup> proceeding that such bundled service is an information service and points to the fact that the resale-at-wholesale obligation only applies to telecommunications services, not information services. Without commenting on the merits of Qwest's alternative argument, Sprint simply points out that Qwest's argument is premature. At this time, the information service "conclusion" is only tentative -- there has not been a final ruling or order. In fact the comment cycle on the *Broadband Wireline NPRM* has not yet closed.

However, given the strength of Qwest's argument above that Rule 51.605(c) applies because Qwest is not the retail provider of the service to the end-user, resolution of Qwest's alternative argument is not a prerequisite to a grant of Qwest requested ruling

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<sup>11</sup> *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, FCC 96-489, released December 24, 1996.

<sup>12</sup> *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, FCC 02-42, released February 15, 2002 ("*Wireline Broadband NPRM*")

herein. Accordingly, Sprint urges the Commission to issue the Declaratory Ruling sought by Qwest.

Respectfully submitted,

SPRINT CORPORATION

By:                     //s//                    

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May 15, 2002

# CERTIFICATE OF SERVICE

I, Joyce Y. Walker, hereby certify that I have on this 15<sup>th</sup> day of May 2002, served via Hand Delivery or Facsimile, a copy of the foregoing letter," In the Matter of Petition of Qwest Corporation for Declaratory, File No. WC 02-77" with the Secretary, Federal Communications Commission.

//s//  
Joyce Walker